

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of
Radio Layne, LLC, Request for Waiver of
Section 1.2109 of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2007

Released: February 7, 2007

By the Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. By this Order, we grant a partial waiver of Section 1.2109 of the Commission's rules to Radio Layne, LLC ("Radio Layne"), the winning bidder for FM broadcast construction permit FM003A (King Salmon, AK) (the "Permit") in Auction No. 37. The down payment required for the Permit was paid out of the upfront payment Radio Layne submitted to participate in the auction. Radio Layne then failed to pay the remaining balance of its winning bid by the deadline. This balance was received by the Commission one day after the deadline, during the late payment period provided for under Section 1.2109(a). However, Radio Layne did not submit the 5 percent late fee required by the rule until after the end of the late payment period. Radio Layne requests that the late fee requirement of Section 1.2109(a) be waived. In the alternative, Radio Layne seeks a waiver of Section 1.2109(c), which provides that a winning bidder that fails to remit the balance of its winning bid in a timely manner will be deemed to have defaulted, its application will be dismissed, and it will be liable for a default payment. For the reasons set forth below, we grant Radio Layne a waiver of the late payment deadline established under Section 1.2109(a), but not of the requirement of paying a late fee. Because we waive Radio Layne's late payment deadline, its request for waiver of Section 1.2109(c) is moot.

II. BACKGROUND

2. Section 1.2109(a) of the Commission's rules provides that auction winners are required to pay the balance of their winning bids in a lump sum by the payment deadline established by public notice. A winning bidder that fails to do so is allowed to make payment within ten business days after the payment deadline, provided that it also pays a late fee equal to 5

1 See Letter from Lee J. Peltzman, Esq., Attorney for Radio Layne, LLC, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission (August 2, 2005) ("Petition"); Letter from Lee J. Peltzman, Esq., Attorney for Radio Layne, LLC, to Marlene H. Dortch, Esq., Secretary, Federal Communications Commission (August 22, 2005) ("Supplemental Petition"); 47 C.F.R. § 1.2109.

2 47 C.F.R. § 1.2109(a).

3 Petition at 2 (citing 47 C.F.R. § 1.2109(c)).

percent of the amount due.⁴ When a winning bidder fails to pay the balance of its winning bid and the late fee by the late payment deadline, it is considered to be in default on its license and is subject to the applicable default payments.⁵ Section 1.2109(c) of the Commission's rules provides that a winning bidder that fails to remit the balance of its winning bid in a timely manner will be deemed to have defaulted, its application will be dismissed, and it will be liable for the applicable payment in 47 C.F.R. § 1.2104(g).⁶

3. Bidding in Auction No. 37 began on November 3, 2004, and concluded on November 23, 2004. Radio Layne was the winning bidder for the Permit, with a gross bid of \$34,000. Radio Layne received a 25 percent bidding credit, so that its net winning bid for the Permit was \$25,500.⁷ Radio Layne's upfront payment to participate in Auction No. 37 was sufficient to satisfy its down payment obligation for the Permit as well as a portion of the remaining balance. On May 20, 2005, the Media Bureau released a Public Notice indicating that it would grant the Permit "following the full and timely payment of the remaining balance of the applicant's winning bid."⁸ After application of its upfront payment, Radio Layne owed a remaining balance of \$16,782.05. Consistent with Section 1.2109(a), the Prepared to Grant Public Notice established a payment deadline of June 6, 2005, and stated that a winning bidder that did not meet the June 6, 2005, deadline would be allowed to pay its remaining balance plus a 5 percent late fee by June 20, 2005.⁹ The Media Bureau cautioned that failure to meet this late payment deadline would cause a winning bidder to "be in default and subject to the default payment procedures specified in the Commission's rules."¹⁰

4. Radio Layne asserts that Mr. Scott Powell, one of its principals, directed the First National Bank of Baird ("First National") to wire its outstanding balance of \$16,782.05 to Mellon Bank, the financial institution that receives payments of winning bids on behalf of the

⁴ 47 C.F.R. §§ 1.2109(a) & 73.5003.

⁵ 47 C.F.R. § 1.2109(a). *See also* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 428-31 (1997) ("*Part 1 Third Report and Order*").

⁶ 47 C.F.R. § 1.2109(c). Section 1.2104(g) provides that a bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction. A high bidder that defaults after an auction closes is liable for a payment equal to the difference between the amount of its high bid and the amount of the winning bid in a subsequent auction, calculated pursuant to Section 1.2104(g)(1), plus an additional payment equal to 3 percent of the subsequent winning bid.

⁷ "FM Broadcast Construction Permits Auction Closes," *Public Notice*, 20 FCC Rcd 1021 (2004) ("*Closing Public Notice*").

⁸ "Media Bureau Is Prepared to Grant Certain Auction No. 37 Broadcast Construction Permit Applications," *Public Notice*, 20 FCC Rcd 9027, 9027 (2005) ("*Prepared to Grant Public Notice*").

⁹ *Id.* at 9027-28 (citing 47 C.F.R. § 1.2109(a)).

¹⁰ *Prepared to Grant Public Notice*, 20 FCC Rcd at 9028 (citing 47 C.F.R. §§ 73.5003, 1.2104(g)(2), 1.2109, & 1.2107(b)); *In re Application of Delta Radio, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 16889 (2003) ("*Delta Radio*"); *Abundant Life, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 4972 (2001); "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules," *Public Notice*, 11 FCC Rcd 10853 (1996)).

Commission, on the morning of June 6, 2005.¹¹ However, this money was not received in the account maintained by Mellon Bank for the Commission until June 7, 2005, a day after the payment deadline. Further, Radio Layne did not submit the necessary 5 percent late payment fee of \$839.11 until August 15, 2005, several weeks after the late payment deadline of June 20, 2005.¹² Without a waiver of the late payment deadline, therefore, Radio Layne would have been in default as of June 21, 2005.

5. Radio Layne claims that it did not submit the required 5 percent late fee on time because of its mistaken belief that its outstanding balance had been received by the payment deadline. Mr. Powell states in a sworn declaration that “[w]e did not do anything different with this wire than we had with all of the other wire payments” and indicates that he was “surprised, subsequently, to hear that the Commission did not receive the wire until [June 7].”¹³ Mr. Powell and Mr. Kerry Wicker, a Vice President of First National, both assert that First National was solely responsible for this delay.¹⁴ Citing these circumstances, Radio Layne first asks that the Commission waive the late payment fee requirement. In the event the Commission declines to waive the late fee requirement, the company alternatively requests that the Commission waive Section 1.2109(c), which provides that the applications of winning bidders that default will be dismissed. Radio Layne asserts that it was “in no way responsible for any late payment,” and that “[i]t should not suffer the penalty of dismissal of its application because of any problems caused by its bank.”¹⁵

6. Radio Layne indicates in its Supplemental Petition that it continues to seek a waiver of the late fee requirement notwithstanding its payment of the fee on August 15, 2005. Radio Layne states that “if it is successful in its waiver request, it will request a refund of the recent payment made to the Commission.”¹⁶

II. DISCUSSION

7. To obtain a waiver of the Commission’s rules, Radio Layne must show that special circumstances warrant deviation from the rules, or that such a deviation would serve the public interest.¹⁷ As explained below, we find that Radio Layne has presented facts sufficient to meet this standard.

8. The Commission’s competitive bidding rules promote a number of statutory purposes, including the development and rapid deployment of new technologies and services for

¹¹ Petition at 1, 2.

¹² Supplemental Petition at 1.

¹³ Petition, Declaration of Scott Powell (“Powell Declaration”).

¹⁴ Petition at 1, 2, Powell Declaration, Letter from Kerry Wicker, Vice President, First National Bank of Baird, to Lee Peltzman, Counsel for Radio Layne, LLC, dated July 28, 2005 (“Wicker Letter”).

¹⁵ Petition at 2.

¹⁶ Supplemental Petition at 2.

¹⁷ *Delta Radio*, 18 FCC Rcd at 16891 ¶ 7; see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)).

the benefit of the public and the efficient and intensive use of spectrum.¹⁸ To achieve these objectives, the rules are designed to provide for an auction and licensing process that assigns licenses only to serious, financially qualified bidders that are able to use the spectrum effectively and efficiently.¹⁹ As the Commission has explained, its competitive bidding rules are intended to protect the integrity of this process by ensuring that the provision of reliable service to the public is not undermined by winning bidders financially incapable of paying the amounts they bid, constructing systems, and providing service.²⁰ As the Commission has further stated, “We have determined that timely payments of auction obligations are the manner in which we can be assured of the financial qualifications, and thus the seriousness, of a winning bidder.”²¹

9. In establishing the ten-day late payment period provided for in Section 1.2109(a), the Commission determined that ten days would “provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems.”²² In establishing the requirement of a 5 percent late fee, the Commission found, *inter alia*, that such a fee would deter bidders from making late payments.²³ The default and application dismissal provisions of Section 1.2109 ensure that entities financially unable to pay their winning bids and provide service do not unfairly acquire licenses that might have been won by other auction participants. In so doing, these provisions also function to deter insincere bidding by entities that are not prepared to use the spectrum efficiently and effectively. As the Commission has stated, “the default provisions

¹⁸ See 47 U.S.C. § 309(j)(3). See also H.R. Rep. No. 103-111, at 253 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580 (finding that “a carefully designed system to obtain competitive bids from competing qualified applicants can speed delivery of services, promote efficient and intensive use of the electromagnetic spectrum, prevent unjust enrichment, and produce revenues to compensate the public for the use of the public airwaves.”).

¹⁹ *Abundant Life, Inc., Memorandum Opinion and Order*, 17 FCC Rcd 4006, 4009 ¶ 8 (2002) (“*Abundant Life III*”). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2375 ¶ 160 (1994) (“*Second Report and Order*”); *Mountain Solutions LTD, Inc., Memorandum Opinion and Order*, 13 FCC Rcd 21983, 21990 ¶ 14 (1998), review denied in part and dismissed in part, *Mountain Solutions LTD, Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (“*Mountain Solutions*”).

²⁰ *BDPCS, Inc., Memorandum Opinion and Order*, 15 FCC Rcd 17590, 17598-99 ¶ 15 (2000) (citing *Second Report and Order*, 9 FCC Rcd at 2381 ¶ 190) (“*BDPCS*”).

²¹ *Abundant Life III*, 17 FCC Rcd at 4009 ¶ 8 (citing *BDPCS, Inc.*, 12 FCC Rcd 3230, 3235 ¶ 8 (1997), recon. denied in part and granted in part, 12 FCC Rcd 15341 (1997)). See also *Delta Radio*, 18 FCC Rcd at 16896-97 ¶ 19 (“Timely auction payments are the principal way we determine whether a winning bidder is financially qualified to build out the permit being auctioned.”); Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113, 25123-24 ¶ 22 (2000) (“Insisting that licensees demonstrate their ability to pay . . . is essential to a fair and efficient licensing process, is fair to all participants in our auctions, including those who won licenses in the auctions and those who did not, and fosters the promotion of economic opportunity and competition in the marketplace.”), recon. denied, Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation for Facilities in the Broadband Personal Communications Services, *Order on Reconsideration*, 16 FCC Rcd 17257 (2001), petition dismissed in part and denied in part, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003).

²² *Third Report and Order*, 13 FCC Rcd at 429-30 ¶ 95. The Commission also concluded that a lengthier late payment period “could threaten the integrity, fairness, and efficiency of the auction process.” *Id.*

²³ *Id.*

are critical for maintaining the integrity of the auction process by discouraging insincere bidding and ensuring that licenses end up in the hands of those parties that value them the most and have the financial qualifications necessary to construct operational systems and provide service.²⁴ Finally, as the Commission has also explained, the default payment rules deter winning bidders from delaying payment in order to give themselves time to decide whether to accept the assignment of a license, which would also be detrimental to other bidders and the efficient and fair functioning of the auction process.²⁵

10. In light of the purposes of the Commission's auction payment rules, we find that the facts of the current case justify the grant of a partial waiver to Radio Layne. Specifically, we waive the late payment deadline, but not the late payment requirement of Section 1.2109(a).

11. First, we find that there is no evidence of Radio Layne being financially unqualified to be a Commission permittee.²⁶ With its wire transfers of June 7, 2005, and August 15, 2005, Radio Layne remitted in full its final payment for the Permit and the required 5 percent late fee. Moreover, the Commission received the entire amount of the final payment of \$16,782.05 for the Permit on June 7, 2005, well before the late payment deadline of June 20, 2005. Although Radio Layne did not pay the late fee of \$839.11 until August 15, 2005, its submission of the entire final payment absent the late fee before the expiration of the late payment period eliminates any concern that the company was financially unable to pay its winning bid.

12. Second, there is no suggestion of any deliberate effort to delay payment, or of any unwillingness to pay, on the part of Radio Layne.²⁷ Instead, the record indicates that Radio Layne directed its bank to pay the full outstanding balance on the June 6, 2005, deadline, and believed that the latter had done so. As described above, Mr. Powell declared under oath that he was "surprised" to learn of the late payment. He noted that this problem had not arisen with Radio Layne's prior wire transfers to the Commission, which had been made in the same manner.²⁸ In addition, First National has admitted that its error caused the payment to be received after the deadline. Mr. Wicker of First National stated that the delayed payment was "due to circumstances having nothing to do with Mr. Powell."²⁹ This evidence indicates that there are no grounds to suspect that Radio Layne either intentionally sought to cause the delay in the wire

²⁴ Winstar Broadcasting Corp., *Memorandum Opinion and Order*, 17 FCC Rcd 6126, 6132 ¶ 15 (2002) ("*Winstar*").

²⁵ *Id.*

²⁶ *Abundant Life III*, 17 FCC Rcd at 4011-12 ¶ 14 (citing *Mountain Solutions*, 13 FCC Rcd at 21990-91, 21993 ¶¶ 14-15, 18 and *Carolina PCS I Limited Partnership*, *Memorandum Opinion and Order*, 12 FCC Rcd 22938, 22943-44 ¶ 13 (1997)).

²⁷ *Abundant Life III*, 17 FCC Rcd at 4012 ¶ 13. See also *Winstar*, 17 FCC Rcd at 6129 ¶ 10; WSS, LLC Request for Waiver of Section 1.2109 of the Commission's Rules, *Memorandum Opinion and Order*, 21 FCC Rcd 6635, 6639 ¶ 7 (2006); Letter to Messrs. David Irwin and Nathaniel Hardy, Counsel for MBO Wireless, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 19 FCC Rcd 4011, 4016 (2004); Metricom, Inc, *Order*, 13 FCC Rcd 890, 891 ¶ 6 ("*Metricom Order*"); High Tech Communications Services, Inc., *Order*, 15 FCC Rcd 6757, 6759 ¶ 5 (1999).

²⁸ Powell Declaration.

²⁹ Petition at 2, Wicker Letter.

transfer or was otherwise unwilling to make its final payment on the Permit.

13. In sum, we find that the facts presented by Radio Layne demonstrate that it is financially qualified to be a Commission permittee and that there was no deliberate effort on its part to delay payment. We find that the circumstances of its late payment meet the standard of special circumstances that warrant a waiver of the late payment deadline. We therefore grant Radio Layne a waiver of the late payment deadline established under Section 1.2109(a).

14. We find, however, that Radio Layne is not entitled to a waiver of the June 6, 2005, deadline for paying the balance of its winning bid or of its obligation under Section 1.2109(a) to pay the 5 percent late fee. Radio Layne was aware, or should have been aware, of its responsibility to ensure the timely submission of its final payment amount.³⁰ As the Commission has previously stated, auction winners bear the responsibility for ensuring that the Commission's financial deadlines are met, and the Commission's default rules exist in part to provide licensees with the incentive to maintain adequate systems for transferring payments to the Commission.³¹ We therefore find that a waiver of the late payment fee would be inappropriate.

III. CONCLUSIONS AND ORDERING CLAUSES

15. For the reasons stated above, IT IS ORDERED pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, that the Petition, dated August 2, 2005, by Radio Layne, LLC, is HEREBY GRANTED IN PART, that the Supplemental Petition, dated August 22, 2005, by Radio Layne, LLC, is HEREBY DENIED, and that Radio Layne, LLC, is not in default under Section 1.2109 of the Commission's rules, subject, however, to the retention by the Commission of the 5 percent late payment fee already paid by Radio Layne, LLC, as described above. This action is taken under delegated authority pursuant to section 0.331 of the Commission's rules, 47 C.F.R. § 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Margaret W. Wiener
Chief, Auctions and Spectrum Access Division

³⁰ *Closing Public Notice*, 20 FCC Rcd at 1022 (stating in bold print that “each winning bidder is responsible for . . . obtaining confirmation from their financial institution that Mellon Bank has timely received their final payment and deposited it in the proper account”); *see also Prepared to Grant Public Notice*, 20 FCC Rcd at 9028 (stating that “[a]pplicants must allow sufficient time for the wire transfer to be initiated and for the transmission to be completed prior to the deadline”).

³¹ *Metricom Order*, 13 FCC Rcd at 891 ¶ 8.